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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of

Amendment of Section 73.606(b),

Table of Allotments, Television

Broadcast Stations and Section

73.622(b), Table of Allotments,

Digital Television Broadcast Stations

(Buffalo, New York)

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MM Docket No. 98-175

RM-9364

Directed to: Chief, Allocations Branch

COMMENTS OF GRANT TELEVISION INC.

Grant Television Inc. ("GTI"), licensee of station WNYO-TV, Buffalo, New York, by its attorneys, hereby submits its comments on the Commission's *Notice of Proposed Rule Making* ("NPRM") in the above-captioned proceeding.

The *NPRM* was issued in response to a Petition for Rulemaking filed by Western New York Public Broadcasting ("WNYPB"), licensee of stations WNED-TV, Channel 17, and WNEQ-TV, Channel 23*, both of which are licensed to Buffalo. In its Petition, WNYPB proposes to "dereserve" Channel 23 and move that allotment's noncommercial designation to Channel 17, thereby enabling WNYPB to sell WNEQ-TV as a commercial facility. Since WNYO-TV will be competing in the same television market as the proposed commercial operation of Channel 23, GTI has an interest in the Commission's resolution of this matter.

GTI takes no position with respect to WNYPB's public interest showing in support of its proposed "swap" of designations between Channel 17 and Channel 23*. Rather, GTI questions whether the Commission has the authority, absent a modification of its rules, to effectuate WNYPB's proposal.

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WNYPB is asking the Commission to dereserve Channel 23 without soliciting competing expressions of interest for that channel, an action which does not appear to be authorized under the Commission's current rules. In this regard, GTI notes that neither the *NPRM* nor WNYPB's Petition cites any rule which specifically authorizes the Commission to take the action proposed in the *NPRM*.

As set forth in the Commission's 1952 *Sixth Report and Order* adopting the Television Table of Allotments, where a noncommercial station operating on a reserved channel seeks to drop its "asterisk" and operate as a commercial facility, the station must (1) petition the Commission to amend the Table to remove the asterisk; and (2) file an application for a new license, in competition with any others who may seek the channel.¹ The *Sixth Report and Order* does not establish an exception for situations where a licensee seeks to remove a noncommercial station's asterisk and attach it to another station that it owns in the market. Accordingly, the *Sixth Report and Order* does not appear to allow the Commission to simply switch Channel 23's asterisk to Channel 17 without soliciting competing applications for Channel 23.

¹ *Sixth Report and Order*, 41 FCC 148, 212 n.51 (1952). These principles were reaffirmed in the Commission's 1996 decision denying station WQED's request to dereserve Channel 16*, Pittsburgh, Pennsylvania, so that the station could be sold as a commercial facility. *Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996). In the Pittsburgh situation, however, there was a federal statute (the Department of Justice and Related Agencies Appropriations Act of 1996) which authorized the Commission to drop Channel 16's asterisk without soliciting competing expressions of interest for the station. The statute addressed the Pittsburgh situation *only*, and thus has no bearing on what WNYPB is attempting to do here.

The Commission rule that most closely addresses this matter is Section 1.420(h), which states that licensees of television stations can jointly petition to amend Section 73.606(b) to exchange channels, without subjecting either channel to competing expressions of interest, where one of the licensees operates on a commercial channel while the other operates on a reserved noncommercial channel within the same band. In a channel swap situation, the noncommercial station moves to a different channel but retains its asterisk (for example, where Channel 50* swaps with commercial Channel 56, it carries its asterisk over to channel 56, so that the Table of Allotments now reads Channel 50, Channel 56*).² By contrast, WNYPB's proposal does not involve an exchange of channels as provided for in the rule. WNED-TV will remain on Channel 17, and WNEQ-TV will remain on Channel 23*.

It is well settled that the Administrative Procedure Act ("APA") precludes the Commission from adopting a new rule without providing interested parties with prior notice and a full opportunity to comment on the rule at issue.³ Given the absence of any Commission rule which specifically authorizes the action proposed in the *NPRM*, GTI suggests that the Commission should issue an *NPRM* to propose a modification of Section

² Channel swaps also may involve a change in the noncommercial station's facilities on the new channel, e.g., the noncommercial station swaps transmitter sites with the commercial facility, or is allowed to improve its coverage over its community of license at its existing site. See, e.g., *Sangre de Cristo Communications v. FCC*, 139 F.3d 953 (D.C. Cir. 1998); *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 5 FCC Rcd 6566 (1990). The instant proposal does not involve any technical changes to Channel 17 or Channel 23*.

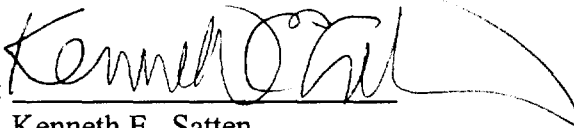
³ 5 U.S.C. § 553.

1.420(h) that would authorize “designation swaps” in this case and all future cases, without solicitation of competing expressions of interest. Such a rule modification is critical here, since application of the rule in question, Section 1.420(h), operates to foreclose interested parties from exercising fundamental rights to file competing applications.⁴ In view of the rights at stake, clarity in the rule is essential. A rule change would permit WNYPB and other similarly affected parties to accomplish their objectives in full compliance with the Commission’s Rules and the APA. Absent such a change, the WNYPB proposal should be rejected.

Respectfully submitted,

GRANT TELEVISION INC.

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⁴ See *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560-61 (D.C. Cir. 1987).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 1998, I caused copies of the foregoing "Comments of Grant Television Inc." to be mailed via first-class postage prepaid to the following:

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